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Issue Date: 14 September 2004

CASE NUMBER: 2003-LHC-01139

OWCP NUMBER: 14-135247

In the Matter of:

BERNICE SCHUCHARDT (widow of Lawton F. Schuchardt),
Claimant,
v.

**ZIDELL MARINE CORP., NORTHWEST MARINE IRON WORKS, INC.,
DILLINGHAM SHIP REPAIR, and WILLAMETTE IRON & STEEL/GUY F. ATKINSON CO.,**
Employers,
and

**ELDORADO INSURANCE CO., SAIF CORP., INDUSTRIAL INDEMNITY/FREMONT,
WAUSAU INSURANCE CO., PINNACLE INSURANCE CO., and ZENITH INSURANCE CO.,**
Insurers.

Appearances

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Before: Paul A. Mapes
Administrative Law Judge

DECISION AND ORDER AWARDING BENEFITS

This case involves a claim arising under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §901 *et seq.* (hereinafter referred to as the "Act" or the "Longshore Act"). In brief, the claimant, Bernice Schuchardt, alleges that the death of her late husband, Lawton Schuchardt, was at least partially caused by his work-related exposure to asbestos while employed by various shipyards in the vicinity of Portland, Oregon. A trial on the merits of the claim was held in Portland, Oregon, on February 24 and 25, 2004.¹ All parties were represented by counsel and the following exhibits were admitted into evidence: Claimant Exhibits (CX) 1-28, self-insured Zidell Exhibits (ZX) 1-56, Northwest Marine Iron Works-SAIF Exhibits (NWMX) 1-6, Willamette Iron & Steel-Wausau Exhibit (WX) 1, Dillingham Exhibits (DX) 1-3, Zidell-SAIF Exhibits (ZSX) 1-17, and Oregon Insurance Guaranty Association Exhibits (OX) A-D and G. As contemplated during the trial, self-insured Zidell submitted a copy of the transcript of a post-trial deposition of Carl A. Mangold and that transcript has been admitted into evidence as Self-Insured Zidell Exhibit 57. In addition, on May 2, 2004, self-insured Zidell submitted a motion asking that three additional exhibits be admitted into evidence. That motion was unopposed and the proposed exhibits were therefore admitted into evidence as self-insured Zidell Exhibits 58-60. Because self-insured Zidell has been permitted to submit these post-trial exhibits, it has been determined that proposed OIGA Exhibits E and F will also be admitted into evidence. All parties filed post-trial briefs.

BACKGROUND

Layton Schuchardt was born in Idaho on April 25, 1929 and graduated from high school while living in Oregon. ZSX 6 at 46. From 1950 to 1965, he worked for a company known as Vermiculite Northwest, Inc., where he was repeatedly exposed to asbestos. ZX 50 at 134-36, CX 13 at 18, CX 20 at 64. According to union dispatch records, in 1966 Mr. Schuchardt began working for Zidell Marine (hereinafter "Zidell") and continued in that employment until June of 1974. CX 14 at 26, CX 13 at 19. He then worked for Willamette Iron and Steel (hereinafter "Willamette") for approximately three months before taking a job with FMC Corp. (hereinafter "FMC") that lasted until November of 1976. CX 14 at 26. From January of 1977 until December of 1979, Mr. Schuchardt worked intermittently for Zidell, FMC, and Dillingham Ship Repair (hereinafter "Dillingham"). CX 14 at 26. During the period between January of 1980 and May of 1984, he worked only for Zidell. CX 14 at 26. In August of 1984, he was employed for four days by Northwest Marine Iron Works (hereinafter "Northwest Marine") and then began working intermittently for Dillingham. CX 14 at 26. The intermittent employment by Dillingham continued from September of 1984 until April of 1987. CX 14 at 26-27. In August of 1987, Mr. Schuchardt again went to work for Northwest Marine and worked intermittently for that employer until the end of March of 1988. CX 14 at 27. From then until December of 1989, he worked intermittently for Northwest Marine and West States, Inc. (hereinafter "West States"). CX 14 at 27-28. The union records also show that Mr. Schuchardt's last maritime employer was Zidell, which employed him from April 2, 1990 until April of 1991. ZSX 2 at 12.

¹ During the trial, all parties consented to the dismissal without prejudice of FMC Corp. and Zidell Marine Corp. insofar as Zidell was insured by Fremont Insurance. Tr. at 14-16, 233. The dismissals were granted with the understanding that the dismissed parties will not raise timeliness as a defense in the event that another claim for Mr. Schuchardt's death is filed against any of them. Tr. at 14-16, 233-34.

On April 7, 1991, Mr. Schuchardt underwent a screening examination to determine if he might have an asbestos-related disease. CX 18. According to the April 11, 1991 report of the exam, an x-ray of Mr. Schuchardt's lungs showed changes that indicated asbestosis. CX 18. On May 30, 1991, Mr. Schuchardt retired. CX 15 at 34-35. However, at that time he did not considered himself to be physically disabled or unable to continue working. CX 15 at 34-35, ZSX 6 at 110.

On October 10, 1991, Mr. Schuchardt was given a medical examination by Dr. Mark Clark. CX 19. During the examination, Mr. Schuchardt reportedly told Dr. Clark that he had started wearing a mask in the 1970s and felt that he hadn't had "any significant asbestos exposure in the shipyards since the late 1970's." CX 19 at 61. On the basis of x-rays, pulmonary function tests, and the results of a physical examination, Dr. Clark concluded that Mr. Schuchardt had an "[e]xtensive history of asbestos exposure with evidence of asbestosis and asbestos-related pleural changes." CX 19 at 62.

On January 27, 1992, Mr. Schuchardt was given an "independent medical examination" by Dr. Gregory Foster. CX 20. During the examination, Mr. Schuchardt told Dr. Foster that his shipyard employment had involved a lot of major ship overhauls which involved tearing out insulation that contained asbestos and that he had worked near insulators and pipe fitters. CX 20 at 64. Dr. Foster also noted that in the mid-1970s Mr. Schuchardt and his co-workers were told to wear masks and areas with asbestos were "roped off." CX 20 at 64. In 1989, Mr. Schuchardt told Dr. Foster, he began working on a new construction project that involved no asbestos exposure. CX 20 at 64. Dr. Foster concluded that Mr. Schuchardt had pulmonary asbestosis. CX 20 at 64.

On January 28, 1992, Mr. Schuchardt was deposed by attorneys for the defendants in a civil action that he had filed against various manufacturers and distributors of asbestos products. CX 15. According to Mr. Schuchardt's testimony, about 20 to 30 percent of his work on ships took place in engine rooms, where the ships' boilers were located. CX 15 at 40. Although he could not remember the names of any of the ships where he had worked, he was able to recall that when he repaired boilers, his work involved "welding and fitting" and each job would take from 20 to 40 hours to complete. CX 15 at 40, 46. He also remembered that when he repaired boilers, he would sometimes have to tear out firebricks from around the boilers and acknowledged that the bricks could be very dusty if cut or broken. ZSX 6 at 98-99, CX 15 at 41-42. He further testified that when he performed these jobs he knew that the firebricks and the surrounding high temperature cement contained asbestos. CX 15 at 44. In addition, he recalled that he began working on Foster Wheeler brand boilers in the 1960s and said that he saw Foster Wheeler boilers on "almost all" of the ships on which he worked. CX 15 at 45-46. When Mr. Schuchardt was asked when he last worked in a Foster Wheeler boiler, he replied, "[w]ell, it would have probably been in about maybe '86 or '87." CX 15 at 46. However, later during the same deposition, Mr. Schuchardt was asked when he was last exposed to asbestos and he answered, "[e]arly to mid '70s, I would think, maybe '74. I'm not really sure." CX 15 at 49. At no time during the deposition did Mr. Schuchardt identify any specific shipyard employer who had exposed him to asbestos or give the name of the shipyard where he had last worked on a Foster Wheeler boiler.

In February of 1996, Mr. Schuchardt had a “small” heart attack, and in April of 1999 Dr. Michael T. Norris, Mr. Schuchardt’s primary care physician, described Mr. Schuchardt’s lung disease as being “severe. CX 24 at 84, 87. In August of 1999, Mr. Schuchardt reported to Dr. Norris that any activity, such as walking a few steps, left him short of breath. CX 24 at 91. In April of 2000, Dr. Norris noted that Mr. Schuchardt had “some cardiac failure related to his lung disease.” CX 24 at 96. On August 23, 2000, Mr. Schuchardt died as a result of a myocardial infarction. CX 25. However, according to a statement signed by Dr. Norris on March 29, 2001, it is a reasonable medical probability that Mr. Schuchardt’s pulmonary asbestosis hastened his death. CX 26 at 102. Mr. Schuchardt’s death certificate also indicates that pulmonary asbestosis contributed to Mr. Schuchardt’s death. CX 25.

On August 7, 2003, Dr. Carl A. Brodtkin, a board-certified specialist in occupational medicine, signed an affidavit in which he concurred with Dr. Norris’ opinion that Mr. Schuchardt’s death was hastened by his pulmonary asbestosis. CX 27. In addition, Dr. Brodtkin opined that “[g]iven sufficient latency, all of a worker’s occupational exposures to asbestos contribute to causing asbestosis.” CX 27 at 105. Dr. Brodtkin further opined that “[a]dditional occupational doses of asbestos throughout the career of a worker contribute substantially to asbestosis even after an initially high exposure to asbestos in the early portions of a worker’s career.” CX 27 at 105.

Receipts submitted by Mrs. Schuchardt show that she incurred expenses of \$3,439.10 to provide a funeral for Mr. Schuchardt. CX 7.

ANALYSIS

The parties have stipulated: (1) that any alleged injuries to Mr. Schuchardt occurred at a maritime situs and while Mr. Schuchardt was employed in a maritime status, (2) that there is no evidence that Mr. Schuchardt’s death was not hastened by his asbestosis, (3) that the claimant, Bernice Schuchardt, is the widow of Mr. Schuchardt and is entitled to survivors’ benefits under section 9 of the Longshore Act if there is a valid claim under the Act, and (4) that the appropriate compensation rate for benefits under section 9 of the Act is \$225.32 per week.

The primary dispute in this matter concerns the application of the Longshore Act’s “last employer rule.” Under this rule, a single employer may be held liable for the totality of an injured worker’s disability, even though the disability may be attributable to a series of injuries that the worker suffered while working for different employers. In such multiple employer situations, the Ninth Circuit has utilized two distinct tests to determine which of an injured worker’s employers will be held liable for all of the worker’s disability. The first test applies in cases involving disabilities that are categorized as occupational diseases and the second test applies in cases involving disabilities that are the result of multiple or cumulative traumas. *Foundation Constructors v. Director, OWCP*, 950 F.2d 621, 623-24 (9th Cir. 1991). Under the rule which applies in occupational disease cases (e.g., cases involving asbestos-related diseases), the responsible employer is the employer which last exposed the worker to potentially injurious stimuli prior to the date upon which the worker became aware that he was suffering from an occupational disease arising from his employment. See *Port of Portland v. Director, OWCP*,

932 F.2d 836, 840 (9th Cir. 1991); *Todd Pacific Shipyards Corp. v. Director, OWCP*, 914 F.2d 1317 (9th Cir. 1990); *Lustig v. U.S. Department of Labor*, 881 F.2d 593, 596 (9th Cir. 1989); *Kelaita v. Director, OWCP*, 799 F.2d 1308, 1311 (9th Cir. 1986).

As previously explained, Mr. Schuchardt did not know that he had an asbestos-related disease until April of 1991. Hence, in this case, the responsible employer will be the last employer to have exposed Mr. Schuchardt to potentially harmful levels of asbestos prior to April of 1991.

In attempting to prove that an occupational disease arose out of employment with a particular employer, claimants are aided by subsection 20(a) of the Act, which provides that in proceedings to enforce a claim under the Act, "it shall be presumed, in the absence of substantial evidence to the contrary—(a) that the claim comes within the provisions of the Act...." In order to invoke this presumption, a claimant must produce evidence indicating that he or she suffered some harm or pain and that working conditions existed or an accident occurred that could have caused the harm or pain. See *Kelaita v. Triple A Machine Shop*, 13 BRBS 326 (1981). Thus, the presumption cannot be invoked if a claimant shows only that he or she suffers from some type of impairment. See *U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608 (1982). However, a claimant is entitled to invoke the presumption even if he or she adduces just "some evidence tending to establish" both prerequisites and is not required to prove such prerequisites by a preponderance of the evidence. *Brown v. I.T.T./Continental Baking Co.*, 921 F.2d 289, 296 n.6 (D.C. Cir. 1990) (emphasis in original). Once the subsection 20(a) presumption has been properly invoked, the relevant employer is given the burden of presenting "substantial" evidence to counter the presumed relationship between the claimant's impairment and its alleged cause. *Dower v. General Dynamics Corp.*, 14 BRBS 324 (1981). If the presumption is rebutted, it falls out of the case and the administrative law judge must weigh all of the evidence and resolve the issue based on the record as a whole. *Hislop v. Marine Terminals Corp.*, 14 BRBS 927 (1982). Under the Supreme Court's decision in *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267 (1994), the ultimate burden of proof then rests on the claimant. See also *Holmes v. Universal Maritime Services Corp.*, 29 BRBS 18, 21 (1995).

In this case, the claimant argues that the subsection 20(a) presumption is applicable against all of the remaining defendants and asserts in her post-trial brief that the presumption has not been rebutted by any of those defendants. Tr. at 21-22. In addition, the claimant contends that the last responsible employer is Northwest Marine, which employed Mr. Schuchardt in 1987, 1988 and 1989, and that if for some reason Northwest Marine is not liable, the last responsible employer is Dillingham, which employed Mr. Schuchardt in 1984, 1985, 1986, and 1987. CX 14 at 26-27, Tr. at 21.

On the other hand, Northwest Marine, Dillingham, and various other defendants have suggested that they are not responsible for the payment of Longshore Act benefits: (1) because the evidence offered by the claimant is allegedly insufficient to warrant invocation of the subsection 20(a) presumption, (2) because one of the other companies that employed Mr. Schuchardt after 1987 may have been the last employer to have exposed him to potentially harmful levels of asbestos, and (3) because the record contains evidence that is purportedly sufficient to rebut the subsection 20(a) presumption.

Findings concerning each of the foregoing arguments are as follows:

1. Invocation of the Subsection 20(a) Presumption

As previously noted, a claimant is entitled to invoke the subsection 20(a) presumption of causation if he or she produces only “*some* evidence tending to establish” both of the subsection 20(a) prerequisites and is not required to prove such prerequisites by a preponderance of the evidence. Hence, in this case, the claimant need provide only some evidence that Mr. Schuchardt’s death was related to an impairment and only some evidence that there were working conditions that could have caused that impairment. The claimant has attempted to make such a showing by submitting the following evidence: (1) medical records verifying Mr. Schuchardt’s asbestosis, (2) Dr. Brodtkin’s affidavit indicating that any level of exposure to asbestos can cause or contribute to asbestosis, and (3) Mr. Schuchardt’s deposition testimony concerning his work-related exposure to asbestos. In addition, the claimant’s post-trial brief contends that evidence of work-related asbestos exposure is also found in the testimony of Dr. Kenneth Cohen, an industrial hygienist who testified that if Mr. Schuchardt stepped aboard any steam propulsion vessel and “breathed the air” it is more likely than not that he breathed some “residual” asbestos, unless there had been a scrupulous abatement of asbestos from that ship. Tr. at 364. Dr. Cohen also testified that if Mr. Schuchardt worked in or near boiler rooms on Navy vessels at Dillingham from September 17, 1984 to April 4, 1987, he probably inhaled asbestos fibers from time to time because these vessels probably had been insulated with asbestos and it was unlikely that a successful abatement had occurred by that time period. Tr. at 350. Likewise, he testified, Mr. Schuchardt would have been exposed to asbestos if he worked on Navy vessels for Northwest Marine during that period. Tr. at 364. However, Dr. Cohen also testified that after 1982 the Navy and builders of civilian vessels attempted to prevent newly constructed vessels from being asbestos hazards. Tr. at 366-67.

None of the defendants has in any way challenged the accuracy of the medical records showing that asbestosis contributed to Mr. Schuchardt’s death and it is therefore clear that the claimant has satisfied the first of the two requirements for invoking the subsection 20(a) presumption. However, at least some of the defendants, including both Northwest Marine and Dillingham, have argued that insofar as they are involved, there is not enough evidence in the record to warrant a finding that the second subsection 20(a) requirement has been met. In other words, these defendants contend that the claimant has not made a sufficient showing that Mr. Schuchardt was exposed to potentially harmful levels of asbestos while employed at their particular shipyards.

As previously noted, the claimant is relying on two types of evidence to show that Mr. Schuchardt was exposed to potentially harmful levels of asbestos. First, the claimant is relying on Mr. Schuchardt’s own statements concerning his recollections of being exposed to asbestos. Second, the claimant is relying on Dr. Cohen’s professional opinion concerning the likelihood of asbestos exposure in certain types of work environments.

When evaluating Mr. Schuchardt’s statements concerning his exposure to asbestos, it is necessary to recognize that these statements are arguably inconsistent. For example, in view of

Mr. Schuchardt's deposition testimony that he last worked in a Foster Wheeler boiler in 1986 or 1987 appears to be inconsistent with his later testimony during the same deposition that he thought he was last exposed to asbestos in the early-to-mid 1970s. Likewise, Mr. Schuchardt's deposition testimony also seems to be inconsistent with the passage in Dr. Clark's report indicating that Mr. Schuchardt hadn't had "any significant asbestos exposure since the late 1970's." CX 15 at 49 (deposition testimony), CX 19 at 61 (report of Dr. Clark). It is also noted that when Mr. Schuchardt testified about the last time he worked in a Foster Wheeler boiler, he explicitly qualified his recollection of the years 1986 or 1987 with the words "probably" and "maybe." It has thus been argued that Mr. Schuchardt's deposition testimony is not reliable evidence concerning the date of Mr. Schuchardt's last exposure to asbestos. However, it should be recognized that although Mr. Schuchardt gave several different dates when questioned about his last exposure to asbestos, there is nothing in the record explaining exactly what Mr. Schuchardt considered to be an exposure to asbestos. Moreover, the fact that Mr. Schuchardt testified that he had last been exposed to asbestos in the mid 1970s just after testifying that he had worked on Foster Wheeler boilers in 1986 or 1987 suggests that he thought an exposure to asbestos involved exposure to large quantities of asbestos or exposure to visible asbestos rather than exposure to the relatively small but potentially harmful amounts of asbestos that would have occurred when removing fire bricks from around a boiler. Indeed, Dr. Clark's medical report implies that Mr. Schuchardt said that it was only "significant" exposures to asbestos that ended in the late 1970s. It should also be recognized that although Mr. Schuchardt's testimony about working in Foster Wheeler boilers in 1986 or 1987 was somewhat qualified, the testimony was taken in January of 1992 and therefore concerned events that had occurred only five or six years earlier, rather than events that were in the distant past. Accordingly, it has been concluded that Mr. Schuchardt's testimony that he thought he last worked in a Foster Wheeler boiler in 1986 or 1987 by itself constitutes at least "some" evidence of asbestos exposure as recently as 1986 or 1987. Because Mr. Schuchardt's employment records indicate that both Dillingham and Northwest Marine employed Mr. Schuchardt in 1986 and 1987, it is also concluded that there is sufficient evidence to warrant a subsection 20(a) presumption that one of these employers was the last to expose Mr. Schuchardt to asbestos.

In contrast to Mr. Schuchardt's deposition testimony, Dr. Cohen's testimony is evidence of asbestos exposure only to the extent that there is at least some evidence that Mr. Schuchardt worked in the environments described by Dr. Cohen, i.e., evidence that Mr. Schuchardt worked in or near boiler rooms of Navy vessels or on board steam-propelled ships that had not undergone asbestos abatement. In this regard, it is noted that although there is evidence that Mr. Schuchardt worked on ships while employed by Dillingham, Northwest Marine, and other earlier employers, there is no evidence that would indicate when he last worked in or near boiler rooms of Navy vessels or when he had last been on board steam-propelled ships that had not undergone asbestos abatement. In addition, although there is some evidence that Mr. Schuchardt worked for Northwest Marine aboard a passenger vessel known as the *Rotterdam* in 1989, there is no evidence that the *Rotterdam* had not previously undergone asbestos abatement or that it had ever contained asbestos. Tr. at 101-02, 359, 377-79. Likewise, although there is evidence that Mr. Schuchardt worked aboard a Navy vessel for Dillingham in August of 1986, there is no indication that the work he performed was in or near boiler rooms or that the vessel was even built before the Navy quit building ships with asbestos in 1982. Tr. at 382-83. Hence, it has

been concluded that Dr. Cohen's testimony alone cannot provide a basis for identifying the last responsible maritime employer.

2. Possibility that One of the Companies that Employed Mr. Schuchardt between 1988 and 1991 Is the Last Responsible Employer

As previously explained, union dispatch records indicate that Zidell employed Mr. Schuchardt from April of 1990 until April of 1991 and that Zidell was Mr. Schuchardt's last employer before his retirement. ZSX 2 at 12. In addition, these union records show that on seven occasions between April 11, 1988 and December 11, 1989 Mr. Schuchardt was employed by West States for jobs that lasted from one day to 43 days. CX 14 at 27-28. Prior to the trial, Zidell's insurer during 1990 and 1991 (AIG/National Union Fire Insurance Co.), West States, and its insurer, SAIF Corporation, were all dismissed as defendants in this proceeding because no one had provided any evidence that would reasonably support an inference that either Zidell or West States had exposed Mr. Schuchardt to potentially harmful levels of asbestos after 1987.

As already noted, during the trial Dr. Cohen testified that if Mr. Schuchardt worked in or near boiler rooms of Navy vessels or stepped aboard any steam propulsion vessel and "breathed the air," it is more likely than not that he breathed some "residual" asbestos, unless there had been a scrupulous abatement of asbestos from that ship. Tr. at 364. Hence, it has been suggested that although there had not previously been evidence that Mr. Schuchardt had been exposed to asbestos after 1988, Dr. Cohen's testimony provides a basis for finding that either Zidell or West States is in fact the last responsible employer. This argument, however, is not convincing because there is no evidence in the record that would suggest that the kinds of environments described by Dr. Cohen existed on the seven occasions when Mr. Schuchardt worked for West States in 1988 and 1989 or during his employment by Zidell during 1990 and 1991. Most significantly, there was absolutely no evidence concerning the types of vessels that Mr. Schuchardt may have worked on while employed by West States. In addition, the testimony concerning Zidell's operations during 1990 and 1991 strongly suggests that Mr. Schuchardt was not exposed asbestos during that period. *See* Tr. at 197-99 (testimony of Gene Barger that Zidell engaged only in construction of new barges after 1990 and that the new barges did not have any motors, engines, boilers, or sprayed-on insulation), Tr. at 115-17 (testimony of Richard Thorn that after November 22, 1974 Zidell used only new steel to construct barges).

3. Evidence to Rebut the Subsection 20(a) Presumption

A. Northwest Marine

Northwest Marine argues that even if there is enough evidence to warrant a subsection 20(a) presumption that it was the last employer to expose Mr. Schuchardt to asbestos, any such presumption has been rebutted by the testimony of John Flynn, a former Northwest Marine safety manager who testified that since 1975 Northwest Marine had "contracted out" all boiler repair work. Tr. at 391-92. Moreover, argues Northwest Marine, Mr. Flynn's testimony indicates that if Mr. Schuchardt worked in a Foster Wheeler boiler in 1986 or 1987, that work must have occurred during the course of his employment by Dillingham, which was the only other maritime employer to employ Mr. Schuchardt during those years. CX 14 at 26-27. It is

also noted that union dispatch records indicate that Dillingham was Mr. Schuchardt's only maritime employer between September of 1985 and April of 1987 and that in 1987 Mr. Schuchardt worked for Northwest Marine for less than five months. CX 14 at 27.

It has been concluded that Mr. Flynn's testimony constitutes substantial evidence sufficient to rebut any subsection 20(a) presumption that Mr. Schuchardt worked in a Foster Wheeler boiler while employed by Northwest Marine. For this same reason, it has been further determined that the preponderance of the evidence indicates that Mr. Schuchardt was not exposed to asbestos while engaged in boiler repair work for Northwest Marine.

B. Dillingham

Because it has been determined that Mr. Schuchardt did not repair any Foster Wheeler furnaces while employed by Northwest Marine, Dillingham will be the last responsible employer unless it has produced substantial evidence to rebut the subsection 20(a) presumption that it exposed Mr. Schuchardt to asbestos when he was engaged in repairing a Foster Wheeler boiler at its shipyard. In this regard, Dillingham contends that Mr. Schuchardt couldn't have worked on boiler repairs at its shipyard: (1) because Scott Hernandez, an industrial hygienist formerly employed by Dillingham, testified that only welders, not fitters like Mr. Schuchardt, did boiler repair work for Dillingham, and (2) because one of Mr. Schuchardt's co-workers, Joe Otis, testified that only members of a machinists union would repair boilers, not members of Mr. Schuchardt's union. Tr. at 256 (testimony of Scott Hernandez), Tr. at 174, 182, 185 (testimony of Joe Otis).

Arguably, the testimony of Mr. Hernandez and Mr. Otis is sufficient to rebut the subsection 20(a) presumption. However, even if that testimony were sufficient to rebut the presumption, it would still be less probative than the evidence which indicates that Mr. Schuchardt did in fact repair a Foster Wheeler boiler while employed by Dillingham in 1986 or 1987. The most significant consideration in this regard is the fact that although Mr. Otis believed that only members of a machinists union repaired boilers, Mr. Otis twice testified that was not disputing the accuracy of Mr. Schuchardt's testimony about doing repair work inside Foster Wheeler boilers. Tr. at 189-90, 192. Another important consideration is the fact that Mr. Hernandez's testimony that only welders repaired boilers is not inconsistent with Mr. Schuchardt's deposition testimony. Indeed, the testimony that only welders repaired boilers is entirely consistent with Mr. Schuchardt's testimony that he "did welding" about 20 percent of his work time and that his work inside boilers required welding. ZSX 6 at 77-78, 169. It is also noted that Mr. Schuchardt's testimony about working as a welder is fully corroborated by union dispatch records showing that between September of 1985 and April of 1987 he was dispatched on ten separate occasions to work at Dillingham as a "w/f"—an abbreviation that surely means "welder and/or fitter." CX 14 at 26-27.

Consideration has also been given to the fact that the medical reports of Dr. Clark and Dr. Foster suggest that in the 1970s Mr. Schuchardt began wearing protective masks when working around asbestos. CX 19 at 61, CX 20 at 64. However, Mr. Schuchardt's deposition testimony suggests that any such masks were just cotton dust masks, which would be unlikely to fully protect a user from inhaling asbestos. ZSX 6 at 78. Moreover, Mr. Schuchardt's deposition

testimony seems to indicate that he did not in fact wear either a respirator or a mask while working. ZSX 6 at 64 (testimony that he didn't wear a respirator while welding), ZSX 6 at 180 (testimony that he did not wear a respirator or mask). Hence, the evidence does not reasonably support a conclusion that Mr. Schuchardt was ever fully protected from asbestos exposure by a mask or respirator.

Accordingly, it is concluded that Dillingham is the last responsible employer.

ORDER

1. Beginning on August 23, 2000, and for so long as the claimant remains unmarried, Dillingham shall pay the claimant, Bernice Schuchardt, widows' benefits in the amount of \$225.32 per week plus such annual adjustments as are required by the provisions of subsection 10(f) of the Longshore Act. If the claimant remarries, such payments will terminate after two years.

2. Dillingham shall reimburse Bernice Schuchardt for \$3,000 of the expenses she incurred for the funeral of Mr. Schuchardt.

3. Dillingham shall pay interest on each unpaid installment of compensation from the date such compensation became due at the rates to be determined by the District Director.

4. The District Director shall make all calculations necessary to carry out this order.

5. Counsel for the claimant shall within 20 days of service of this order submit a fully supported application for costs and fees to the counsel for Dillingham. Within 15 days thereafter, the counsel for Dillingham shall provide the claimant's counsel with a written list specifically describing each and every objection to the proposed fees and costs. Within 15 days after receipt of such objections, the claimant's counsel shall verbally discuss each of the objections with the counsel for Dillingham. If the two counsel thereupon agree on an appropriate award of fees and costs they shall file written notification within ten days and shall also provide a statement of the agreed-upon fees and costs. Alternatively, if the counsel disagree on any of the proposed fees and costs, the claimant's counsel shall within 15 days file a fully documented petition listing those fees and costs which are in dispute and set forth a statement of his position regarding such fees and costs. Such petition shall also specifically identify those fees and costs which have not been disputed by the counsel for Dillingham. The counsel for Dillingham shall have 15 days from the date of service of such application in which to respond. No reply to that reply will be permitted unless specifically authorized in advance by the undersigned administrative law judge.

A

Paul A. Mapes
Administrative Law Judge

